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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN JAMAL FOUCHER, Defendant and Appellant.	B219514 (Los Angeles County Super. Ct. No. BA255381)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie A. Miyoshi and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Brian Jamal Foucher was convicted by jury of the following offenses: counts 1, 6, and 7—attempted kidnapping for rape (Pen. Code, §§ 664 and 209, subd. (b)(1))[1]; count 2—criminal threats (§ 422); count 3—kidnapping to commit rape (§ 209, subd. (b)(1)); count 4—forcible oral copulation (§ 288a, subd. (c)(2)); count 5—forcible rape (§ 261, subd. (a)(2)); and count 8—assault with a deadly weapon or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

Defendant was sentenced to four consecutive indeterminate terms of life in prison for the convictions of kidnapping for rape and attempted kidnapping for rape (counts 1, 3, 6, and 7). Defendant was sentenced to a determinate prison term of 20 years 8 months for the convictions of criminal threats, forcible oral copulation, forcible rape, and assault with a deadly weapon or by means of force likely to produce great bodily injury (counts 2, 4, 5, and 8).

FACTS

Norma T.—Counts 1 and 2

Norma T. left her home on foot on February 12, 2002, to pick up her daughter at Daniel Freeman Elementary School. As she walked, Norma T. saw a black Acura driven by defendant. Defendant asked Norma T. if she knew where to find 11th street. She told him she did not know. Norma T. tried to cross the street. The Acura made a fast U-turn and caught up to Norma T. at the next street. Defendant screamed at her about how to find 11th street, and she again told him she did not know and to leave her alone.

Defendant removed a gun from the glove compartment, pointed it at Norma T. and screamed, "Get in the car or I'm going to shoot you, mother-fucker." The gun, which was a replica .45 caliber air pistol, was later recovered from defendant's car. In fear of

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[1] All statutory references are to the Penal Code unless otherwise indicated.

being raped, Norma T. refused to get into the car with defendant and tried to walk away. She heard three to four clicks, but did not feel anything, so she walked to her daughter's school.

Norma T. saw defendant again after she had walked about one-half block. Defendant screamed at her, in an even angrier tone than he had used before. He again told her to get in the car, and when she did not comply, she heard three more clicks, but continued walking. Norma T. walked to the end of the street. Defendant went around the block and met her again, screaming to get in the car or he would kill her, while pointing the gun toward her body.

Norma T. walked toward an area where some gardeners were working. Defendant went away when he saw the gardeners. Norma T. then walked to her daughter's school. She did not tell anyone what happened or call the police from the school, because she feared defendant knew where she lived and might harm her family, including her daughter. She told her husband what happened when he got home. Two days later she called the police, after being urged to do so by her daughter's teacher. She was shown photographs of six men and identified defendant within seconds as the man who tried to kidnap her. She later identified defendant's photograph while testifying before the grand jury.

Sammie Lee Young was the principal of Daniel Freeman Elementary School, where Norma T.'s daughter attended kindergarten. On February 14, 2002, Norma T. talked to Young about something that had happened to her. Norma T. was upset and in need of assistance. Following their conversation, Young called the Inglewood School Police, and Officer Jeremiah B. Williams responded

Officer Williams was directed by Young to a scared and nervous Norma T. He spoke with her for 30 minutes. During their conversation, Officer Williams heard a crime broadcast that had similar circumstances to what Norma T. described.

Norma R.—Counts 3-5

At noon on February 12, 2002, Norma R. was doing laundry at a laundromat on La Brea in Inglewood. Her 14-month-old son was with her. When she left the laundromat on her way home, she had her son in a carrier on her chest. A car coming toward her stopped suddenly. She heard someone running, which attracted her attention. Defendant threatened her with a gun, which he put to her shoulder. The gun appeared similar to the replica firearm seized from defendant's car at the time of his arrest.

Defendant pulled Norma R. by her clothes and told her to get into his car. She did not scream for help. Defendant pushed her and her child into a black Acura. Defendant drove as if he knew where he was going, ending up in an alley. Norma R. offered defendant her property if he would let her and her son go. Defendant did not take any property from her. She asked him not to hurt her baby.

There was no one else in the alley, and no traffic.[2] Defendant stopped the car, grabbed Norma R. by the hair and hit her forehead on the passenger side window. Defendant grabbed her by the hair and pulled her so she could give him oral sex. Defendant opened his zipper and lowered his pants and said, "suck me." She put her mouth on his penis. Defendant allowed Norma R. to put her son, who was crying, on the seat between her and the passenger door.

After Norma R. did what defendant wanted, he hit her son and threw him at her feet on the floorboard. Defendant violently turned Norma R. onto her knees on the seat, facing away from him. He lowered her pants and panties and placed his penis in her vagina. Defendant wanted to put his penis back in Norma R.'s mouth, but she refused. Defendant ejaculated on her face. Defendant put himself back together and told her to get out of the car. She got out of the car with her son and left.

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[2] The attacks on Norma T. and Norma R. occurred between one and one and a half miles of each other.

Norma R. rang a buzzer on the back door of a house. Defendant drove away quickly. A lady came to the door and allowed Norma R. to call her cousin, Maria, who came to get her. Maria drove to the area of Ellis Street in Inglewood. Both Norma R. and her baby were crying. Norma R. said she was raped by a strange guy. Maria took Norma R. home, where she called the police. Detective John Baca from the Inglewood Police Department arrived and interviewed her. Detective Baca noticed that Norma R. was very distraught, crying, shaking, and visibly disturbed. Using Maria as an interpreter, Norma R. directed Detective Baca to the dead-end alley where she said the incident occurred. After that he took her to Daniel Freeman Hospital.

Dawn Henry, a registered nurse and sexual assault examiner, was a member of the Sexual Assault Response Team (SART) at Daniel Freeman Hospital. She treated Norma R., following the State of California protocol for sexual assault examinations. Once Norma R.'s patient history was completed, she disrobed and her clothing was taken as evidence, including her blue sweat pants, her panties, and gray sweatshirt. This was followed by an external examination with a ultraviolet lamp, which lit up a possible secretion on her leg, that was removed with a swab.

Nurse Henry looked at Norma R.'s mouth, which was slightly red at the back of the throat, consistent with someone forcing a penis into her mouth. In an internal vaginal examination, Nurse Henry saw redness and a blood blister, which could have been caused by trauma or by consensual sex. The injury was confirmed by a blue dye test. Two oral swabs were taken of Norma R.'s mouth and internal and external swabs were taken of the vagina. Nurse Henry's observations were consistent with what she had been told had happened by Norma R.

Two days later, Norma R. was shown photographs of six men. She instantly recognized defendant and was completely sure of her identification. She also identified defendant's photograph while testifying before the grand jury.

Kirsten Fraser, a senior criminalist for the Los Angeles County Sheriff's Department Scientific Services Bureau, was provided with the evidence in this case on May 11, 2009. No sperm cells were detected from the oral sample, but sperm cells were

found on slides taken from swabs of Norma R.'s thigh and the external genital and internal vaginal areas. Those items testing positive, along with a reference sample received from defendant and Norma R., were forwarded to Amber Sage, another criminalist, after being packaged for DNA testing.

Sage tested the vaginal sample, which generated a profile that is unique, except in the case of identical twins. She also generated a profile from the sample from Norma R. The DNA analysis of the vaginal sample was consistent, in part, with Norma R. The major DNA profile from the sperm sample matched defendant's profile and also indicated the lesser presence of another donor, who could have been Norma R.'s boyfriend.

Defendant's DNA profile was entered in a database. Defendant's profile occurs in one out of 4.32 septillion Caucasians, one out of 38.4 septillion Blacks, and one out of 1.86 septillion Hispanics. A septillion is one followed by 24 zeroes. There are roughly six and a half billion people in the world. Defendant matched all 15 loci tested as being the major sperm donor.

S.H.—Count 6

S.H. left her home in Rancho Palos Verdes to take a walk at 8:00 a.m. on February 14, 2002. About five to ten minutes into her walk, in a very quiet residential area, she saw defendant driving a black Acura Legend in her direction. Defendant stopped, made a U-turn, and continued to drive in the direction from which he had come. S.H. became suspicious of defendant, as she had never seen him or his car in the neighborhood. After S.H. made a left turn while walking, she again saw defendant, this time backing out of a lot with two houses on the property. S.H. took note of the license plate on the Acura, attempting to memorize it as she walked by the car.

As S.H. continued to walk, she heard the car come up again from behind her. She decided the situation was too suspicious and decided to walk home to call the police. As she headed home, S.H. saw defendant once again, parking on the wrong side of the street.

S.H. walked on the opposite side of the street from defendant, but later saw him again after he passed her, made a U-turn, and parked. S.H. walked past his car and across the street, looking at the license plate and defendant's face. S.H. became nervous after concluding defendant was following her.

As S.H. turned right onto her street, defendant drove past her, parked, and got out of his car. He held his right hand behind his back and said, "Lady." S.H. realized defendant had a gun, similar to the one recovered from defendant's car, pointing at her face. Defendant ordered S.H. to "Get into the car," but she instead raised her arms and yelled "help." She then remembered hearing no one would respond if one yells for "help," so she yelled "fire" four times. Defendant turned and walked toward his car. S.H. saw him one more time after defendant turned around in the car and drove past her.

S.H. called 9-1-1 from home. She was uncertain about one digit of the license plate. Deputy Curtis Uyeda responded and took a statement from her, including a description of defendant, his car, and the license plate number. After Deputy Uyeda spoke with S.H., he made a radio broadcast regarding the attempted kidnapping, which included suspect and vehicle descriptions, including the license plate number (4RXL474).

On the same morning that defendant attempted to kidnap S.H., Mina Ghorob was living in a home that was being remodeled on Hawthorne Boulevard in Rancho Palos Verdes. Ghorob was seated in her car in the driveway when defendant parked his Acura and walked toward the house. Defendant asked Ghorob what was going on inside the house. She asked who he was and why he wanted to know. Defendant said, "I'm FBI." Ghorob did not believe him and asked to see his badge. Defendant said he did not need to show her his badge. He again asked what was happening in the house, as Ghorob continued to ask to see his badge. Defendant left.

Ghorob went inside the house to tell the workers what had happened. When she went back outside, defendant returned in the Acura and said, "You need to tell me what's going on inside the house right now." Ghorob said the telephone she was holding in her hand was an intercom into the house, and if she pressed it, the workers would all come

out. Defendant left. Ghorob recorded defendant's license plate number (4RXL476) as he drove off.

Deputy Uyeda also responded to a radio call to speak to Ghorob, whose house was approximately one and a half miles from S.H.'s house. Ghorob gave the deputy a piece of paper with defendant's license plate (4RXL476) recorded on it. That license number was registered to defendant and defendant's mother. The next day, Ghorob positively identified defendant's photograph.

Detective Sherry Rumsey showed S.H. and Ghorob photographs, from which both made immediate identifications of defendant. S.H. also identified defendant's photograph when she testified before the grand jury.

Regina M.—Counts 7 and 8

Regina M. was staying at her parents' house on a quiet residential street in Rancho Palos Verdes on February 14, 2002. She left the house between 7:45 and 8:00 a.m., going on a walk. As she made a right turn, she saw cars parked on the street. The driver's side door of a dark gray or black car opened and defendant exited the vehicle.

Defendant grabbed Regina from behind with his right arm, while holding a gun in his hand. The gun appeared to be the one recovered from defendant at the time of his arrest. Defendant tried to push her into the car. Regina resisted, using her body weight to go in the opposite direction. As they continued to struggle, the gun went off, making a "small blip" sound that was "not very loud." Defendant pushed her to the ground and drove off.

When she got home, Regina did not tell her parents or call the police, as she was in shock and did not want to worry anyone. Three weeks later, on March 6, 2002, she went to the police station at the prompting of friends because she did not want anything like that to happen to anyone else. She also noticed that a pellet from the shot was stuck in her wrist. The pellet was medically removed and given to a detective. Regina immediately identified defendant's photograph when she was shown a six-person photo

lineup on March 7. She also identified defendant's photograph before the grand jury in March 2006.

Defendant's Arrest and Recovery of the Replica Firearm

Detective Marya Parente of the Inglewood Police Department was a training officer assigned to patrol on February 14, 2002. She received information at a patrol briefing from Detective Matt Hart regarding crimes in Inglewood and Rancho Palos Verdes, including suspect and vehicle descriptions. She also received information regarding a crime occurring that day in Lomita, including the same description of a black Acura (license number 4RXL476) given in the briefing and a similar suspect description.

At 6:25 p.m., Detective Parente saw a vehicle matching the description and license number from the other crime reports. She radioed for assistance and pulled over the Acura, which was driven by defendant. An operable replica handgun loaded with pellets[3] was found under the driver's seat.

DISCUSSION

Defendant argues his convictions of kidnapping for rape and attempted kidnapping for rape must be reversed because the trial court erroneously excluded evidence of defendant's mental illness, which would have potentially negated the element of specific intent required for each of these offenses. We hold the trial court properly sustained objections to defendant's proposed evidence.

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3 Detective Hart described the weapon as a replica .45 caliber air pistol that shoots BB's, not pellets.

Background

After the prosecution's case concluded, defense counsel told the trial court that if his client testified, he would like to introduce evidence that defendant was in Patton State Hospital from 2002 to 2007. Counsel also wanted to introduce evidence, through defendant's testimony, as to defendant's mental state while he was in the hospital and why he was there. Counsel believed this evidence went to the issue of specific intent. Counsel advised the court that he would not be able to present testimony of doctors from Patton. If defendant testified, counsel believed he should be allowed to "get into" his mental state at the time of his arrest, why he went to Patton, and that he was in the hospital from 2002-2007.

The prosecutor argued that the reason defendant went to Patton was hearsay with no foundation. Where defendant was located between 2002 and 2007 was irrelevant, prejudicial, and would cause the jury to speculate.

Defense counsel responded that even if some of the matters he sought to prove were hearsay and inadmissible, the fact defendant was in Patton from 2002 to 2007 should be admissible to explain where defendant had been over the years. The trial court questioned why that evidence would not be prejudicial and suggested it was not probative of anything in the case.

Defense counsel said if defendant can formulate that he had delusions and was hearing voices, and that is why he was in Patton, then it would be relevant to his specific intent. The trial court said defendant could not make a diagnosis of himself and there was no foundation for his opinion. Defendant was committed to Patton because of what someone else found, not because of what defendant understood. If defendant were suffering from delusions, the court questioned how he could be a competent source of the proposed testimony. The evidence was excluded under Evidence Code section 352, based upon hearsay and lack of foundation objections. Defendant would not be allowed to testify about where he had been or why he was in Patton.

The discussion then turned to whether defendant would testify, and counsel indicated that defendant had not yet decided. Defense counsel spoke to defendant explaining to him that if defendant were to testify, the prosecution would likely bring in defendant's "long statement, which is a confession, basically, of the crimes committed." Without the confession, it was "a reasonable doubt case, and . . . [m]y opinion is [defendant] should not testify." Defendant agreed that he would forego the right to testify.

Relevant Legal Principles

Evidence of a mental disease, defect, or disorder is not admissible to negate the capacity to form specific intent, but such evidence is admissible to show that a defendant did not actually form the specific intent. (§ 28, subd. (a); *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1362.) Kidnapping for rape is a specific intent offense. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151, fn. 6.) Attempted kidnapping for rape is also a specific intent offense, as an attempt to commit a crime generally requires specific intent. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.)

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Relevant evidence may be excluded under Evidence Code section 352 if it creates a substantial danger of undue consumption of time or of prejudicing, confusing, or misleading the jury. ([*People v. Hall* (1986) 41 Cal.3d 826,] 829.) [¶] We review for abuse of discretion a trial court's rulings on relevance and the exclusion of evidence under Evidence Code section 352. (*People v. Cole* [(2004)] 33 Cal.4th [1158,] 1195.)" (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

Evidence Code section 1200 prohibits the introduction of hearsay evidence, which is defined as "evidence of a statement that was made other than by a witness while

testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subds. (a), (b).)

Evidence of Hospitalization Between 2002 and 2007

The trial court ruled that evidence of defendant's hospitalization between 2002 and 2007 was inadmissible under Evidence Code section 352. This determination was well within the trial court's discretion.

This aspect of defendant's proposed testimony had minimal, if any, probative value. Defendant's whereabouts during that time period was not an issue in dispute at trial, which means it was subject to exclusion on relevancy grounds. (Evid. Code, § 210 [relevant evidence is evidence with any tendancy to prove or disprove a disputed material fact of consequence].) The disputed issues at trial were identification and whether defendant's conduct satisfied the elements of the charged offenses beyond a reasonable doubt. Evidence of the length of defendant's hospitalization after the commission of the charged offenses would have had the potential to consume an undue amount of time and cause the jury to speculate as to matters unrelated to the trial. The Evidence Code section 352 ruling was not an abuse of discretion.

Defendant's Mental State at the Time of Arrest and While in the Hospital and Why he was Committed

Defense counsel sought to introduce defendant's testimony as to defendant's mental state at the time of his arrest and while at Patton, and why he was there. The trial court properly excluded the evidence on Evidence Code section 352, hearsay, and lack of foundation grounds.

Defendant's mental state at the time of the commission of the charged specific intent offenses was an issue in dispute at trial. However, his mental state at the time of his arrest and while he was at Patton had no relevance to the issues at trial. Defense

counsel never proposed to introduce evidence of defendant's mental state at the time he committed the charged offenses. Moreover, defense counsel never suggested how any of this evidence related to defendant's ability to form a specific intent. Exclusion of this potentially confusing and time consuming evidence was not an abuse of discretion under Evidence Code section 352.

The trial court also did not err in excluding evidence of why defendant was hospitalized at Patton. As the prosecutor argued below, defendant was at Patton because of a decision made by someone other than defendant and there was no foundation for defendant to testify as to the actions of a third party. To the extent defendant's testimony would have relied on the reasons stated by the party causing his commitment to Patton, his testimony would have relied upon the truth of matters not stated by a witness at trial, and it was subject to exclusion as inadmissible hearsay. Finally, Evidence Code section 352 provides as independent basis for exclusion of evidence as to why defendant was hospitalized at Patton. The trial court could reasonably conclude that such evidence, not tied to an issue in dispute at trial, would have consumed an undue amount of time and confused the jury.

General Exclusion of Evidence of Defendant's Specific Intent

To the extent defendant argues the trial court's ruling deprived him of the opportunity to present evidence of his mental state, he has overstated the scope of the court's ruling. The trial court did not preclude defendant from testifying. To the contrary, an on-the-record discussion of whether defendant would testify took place immediately after the trial court ruled the evidence pertaining to his hospitalization at Patton was inadmissible. Nor did the trial court exclude all evidence of defendant's mental state in regard to the specific intent offenses. Defendant was free to present evidence as to his mental state at the time of the charged offenses, but he did not tender such evidence at any time. The trial court's limited rulings on the areas of inquiry raised by defense counsel did not constitute an abuse of discretion.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.